Supreme Court, U.S.
FILED
JUL 13 2009
OFFICE OF THE CLERK

No. 08-1391

In the Supreme Court of the United States

ISAAC SIMONE ACHOBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an otherwise valid judgment of conviction entered following a second trial may be overturned based on an alleged insufficiency of the evidence at the first trial, which ended in a mistrial after the jury was unable to reach a verdict.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Blanche Rd. Corp. v. *Bensalem Twp.*, 57 F.3d 253 (3d Cir.), cert. denied, 516 U.S. 915 (1995) 10
Burks v. *United States*, 437 U.S. 1 (1978) 7
Dowling v. *United States*, 453 U.S. 342 (1990) 15
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 6
Jackson v. *Virginia*, 443 U.S. 307 (1979) 6
Justices of Boston Mun. Ct. v. *Lydon*, 466 U.S. 294 (1984) 8
Lambrix v. *Singletary*, 72 F.3d 1500 (11th Cir. 1996), aff'd, 520 U.S. 518 (1997) 10
Ohio v. *Johnson*, 467 U.S. 493 (1984) 15
Olson v. *Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731 (7th Cir. 1986) 9
Price v. *Georgia*, 398 U.S. 323 (1970) 10
Richardson v. *United States*, 468 U.S. 317 (1984) .. *passim*
Sorensen v. *City of New York*, 413 F.3d 292 (2d Cir. 2005) 10
United States v. *Calderon*, 348 U.S. 160 (1954) 10

Cases–Continued: Page

United States v. *Coleman*, 862 F.2d 455 (3d Cir. 1988), cert. denied, 490 U.S. 1070 (1989) 11

United States v. *Cross*, 258 Fed. Appx. 259 (11th Cir. 2007) 13

United States v. *Gulledge*, 739 F.2d 582 (11th Cir. 1984) 14, 15

United States v. *Julien*, 318 F.3d 316 (1st Cir.), cert. denied, 539 U.S. 968 (2003) 11

United States v. *Martinez*, No. 93-10423, 1994 WL 623007 (9th Cir. Nov. 9, 1994) 10

United States v. *Miller*, 952 F.2d 866 (5th Cir.), cert. denied, 505 U.S. 1220 (1992) 4

United States v. *Recio*, 371 F.3d 1093 (9th Cir. 2004) 5, 11, 12, 13

United States v. *Rey*, 641 F.2d 222 (5th Cir.), cert. denied, 454 U.S. 861 (1981) 14

United States v. *Valenzuela-Ruiz*, No. 93-50567, 1994 WL 561833 (9th Cir. Oct. 13, 1994), cert. denied, 514 U.S. 1075 (1995) 10

United States v. *Wilkinson*, 601 F.2d 791 (5th Cir. 1979) 14

United States v. *Willis*, 102 F.3d 1078 (10th Cir. 1996), cert. denied, 521 U.S. 1122 (1997) 11

Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 6

Winshhip, In re, 397 U.S. 358 (1970) 6

Yeager v. *United States*, 129 S. Ct. 2360 (2009) 9

Constitution and statutes: Page

U.S. Const. Amend. V (Double Jeopardy Clause) . 7, 8, 9, 15
18 U.S.C. 1956(a)(1)(A) 2
21 U.S.C. 841(a)(1) 1
21 U.S.C. 846 2
21 U.S.C. 1291 14

Miscellaneous:

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 6

In the Supreme Court of the United States

No. 08-1391

ISAAC SIMONE ACHOBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 560 F.3d 259.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2008. A petition for rehearing was denied on February 10, 2009 (Pet. App. 38a-40a). The petition for a writ of certiorari was filed on May 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, following an initial mistrial, in the United States District Court for the Southern District of Texas, petitioner was convicted on two counts of unlawful drug distribution, in violation of 21 U.S.C.

841(a)(1), one count of conspiring to commit unlawful drug distribution, in violation of 21 U.S.C. 846, and six counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A). He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. The court of appeals reversed two of the money-laundering convictions, affirmed the remaining convictions, and remanded for further proceedings. Pet. App. 1a-27a.

1. Petitioner owned and ran an independent pharmacy in Houston, Texas. At least 30 to 40 percent of his business involved filling prescriptions from "pain management" doctors. Pet. App. 2a-3a.

In 2002, petitioner had a conversation with Dr. Callie Herpin, who was working part-time at a pediatrics clinic in the same building as petitioner's pharmacy. After Dr. Herpin told petitioner that she was unhappy with her job because she worked too many hours for too little pay, petitioner suggested that she enter the "pain management" business. Petitioner introduced Dr. Herpin to two other physicians who were "pain management specialists" and offered to refer "patients" for whom Dr. Herpin could write prescriptions. Petitioner also gave Dr. Herpin advice about running a "pain management" practice, such as: "'[D]on't write prescriptions for people that didn't exist,' 'don't do lists,' and don't write 'large quantities.'" Pet. App. 7a (brackets in original); see *id.* at 2a-3a.

Soon after her 2002 conversation with petitioner, Dr. Herpin went from writing small numbers of prescriptions for individual patients to selling prescriptions to drug dealers. The dealers would use the prescriptions to buy the drugs from various pharmacists, including petitioner. These purchases were all made in cash, and

there was testimony at trial "that the amounts of drugs being prescribed were unusual, as were the refill authorizations." Pet. App. 4a. "[T]he prescriptions were often nearly identical," and, in many cases, dealers would "come in repeatedly with scripts filled out in many different individuals' names." *Id.* at 3a-4a. Although petitioner "himself spurned some of the more egregious of these practices," *id.* at 3a, and "would not fill prescriptions from lists," *id.* at 5a, he still filled more than six hundred scripts written by Dr. Herpin during the course of the charged conspiracy for drugs that were "extremely prone to abuse [by] drug dealers," *id.* at 8a.

2. In April and May of 2005, petitioner and five others were tried before a jury in the Southern District of Texas. 4:04-cr-00442-5 Docket entry Nos. 322-371 (Apr. 18, 2005-May 11, 2005). At the conclusion of the government's case in chief and at the close of the evidence, petitioner moved for a judgment of acquittal. Pet. App. 28a, 34a-35a. The district court denied those motions, *id.* at 33a, 37a, and, after the jury was unable to agree on a verdict, declared a mistrial, *id.* at 3a. Petitioner was tried a second time, and the jury found him guilty on all counts. *Id.* at 4a.

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-27a. The court agreed with the government's concession that it had not presented sufficient evidence at the second trial to support the jury's verdict on two of the money laundering counts, *id.* at 16a-17a, and it remanded "for further proceedings consistent with this opinion including any additional sentencing proceedings found necessary by the district court," *id.* at 27a.

The court of appeals rejected the remainder of petitioner's claims. As relevant here, the court concluded

that the government's evidence at the second trial was sufficient to support the jury's verdict on the conspiracy and drug-distribution counts, Pet. App. 5a-9a, and it refused to consider whether the government's evidence at the first trial had been sufficient as well, *id.* at 9a-14a.[1] Relying on *Richardson* v. *United States*, 468 U.S. 317 (1984), as well as its own decision in *United States* v. *Miller*, 952 F.2d 866 (5th Cir.), cert. denied, 505 U.S. 1220 (1992), the court of appeals held "that where a first trial has ended in a mistrial due to a hung jury and a second trial leads to a conviction, the sufficiency of the evidence presented at the first trial cannot then be challenged on appeal." Pet. App. 14a.

The court of appeals explained that its decision was based on "the simple proposition that there must be a termination of the first jeopardy before there can be a second," Pet. App. 9a, and that "[t]he failure of a jury to reach a verdict is not an event which terminates jeopardy," *id.* at 10a (quoting *Richardson*, 468 U.S. at 325). The court acknowledged that this case is in a different procedural posture than *Richardson*. In *Richardson*, the defendant sought to prevent a second trial by "interposing [a] double jeopardy claim[]" via an interlocutory appeal, whereas petitioner "looks to renew his challenge to the district court's ruling on a motion that has only now become appealable, since judgment is final." *Id.* at 11a. But the court concluded that permitting petitioner to pursue his sufficiency claim with respect to the first trial nonetheless would "conflict[] with" *Richardson*, and it observed that "[t]he predominance of the

---

[1] The court of appeals also rejected a variety of other arguments that petitioner does not renew before this Court. See Pet. App. 15a-27a.

case law from other circuits supports our application of *Richardson*." *Id.* at 12a.

The court of appeals recognized that a divided Ninth Circuit panel had "[r]ead[] *Richardson* narrowly" in "a procedurally complicated case" where the panel ultimately "reversed and remanded * * * for a new trial, the third in that case, after upholding the sufficiency of the evidence at the first trial." Pet. App. 13a-14a (discussing *United States* v. *Recio*, 371 F.3d 1093 (9th Cir. 2004)). The court of appeals stated that it "decline[d] to follow the *Recio* court," and it observed that the *Recio* panel's interpretation of *Richardson* "was not dispositive" even in *Recio* itself, because the panel "found there was sufficient evidence [at the first trial] and remanded for a new trial." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 13-30) that the alleged insufficiency of the evidence at his first trial could form the basis for overturning his convictions following his second trial, at which the evidence was concededly sufficient. The court of appeals correctly rejected that contention, and further review is unwarranted.

1. As an initial matter, this Court's review is unwarranted at this time because the case is in an interlocutory posture. The court of appeals reversed two of petitioner's convictions and remanded "for further proceedings consistent with this opinion including any additional sentencing proceedings found necessary by the district court." Pet. App. 27a. Following the district court's final disposition of the case, petitioner will be able to raise his current claim—together with any other claims that may arise on remand—in a single petition for a writ of certiorari. The interlocutory posture of the case

"alone furnishe[s] sufficient ground for the denial" of this petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); see also Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002) (noting that this Court routinely denies petitions for a writ of certiorari by criminal defendants challenging interlocutory determinations that may be reviewed at the ultimate conclusion of the criminal proceedings and explaining that this practice promotes judicial efficiency).

2. In any event, the court of appeals correctly held that an alleged insufficiency of the evidence at an initial trial that ended in a mistrial provides no basis for overturning a conviction entered after a second trial at which the evidence was sufficient.

This Court has held that a defendant has a due process right not "to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson* v. *Virginia*, 443 U.S. 307, 316 (1979); see *In re Winship*, 397 U.S. 358, 362-363 (1970). Petitioner does not claim, however, that he was *convicted* based on insufficient evidence: petitioner's first trial ended in a mistrial and petitioner does not challenge the court of appeals' conclusion that the evidence at his second trial was sufficient to convict. See Pet. i, 29; Pet. App. 5a-9a. Petitioner's claim is thus necessarily that the alleged insufficiency of the evidence at his first trial either prohibited the commencement, or invalidates the result, of his second trial.

As the court of appeals correctly concluded, that contention is inconsistent with this Court's decision in *Rich-*

ardson v. *United States*, 468 U.S. 317 (1984). In *Richardson*, the defendant moved for a judgment of acquittal at the conclusion of the government's case in chief and renewed that motion at the close of the evidence. *Id.* at 318. As in this case, the district court denied those motions and submitted the case to the jury, which was unable to reach a verdict with respect to two counts. *Id.* at 319. The district court then declared a mistrial with respect to those counts and scheduled a new trial. *Ibid.* Richardson appealed, arguing that the Double Jeopardy Clause barred the retrial because the evidence at the first trial was legally insufficient. *Ibid.*

After concluding that it had jurisdiction over Richardson's double-jeopardy appeal under the collateral order doctrine, *Richardson*, 468 U.S. at 320-322, the Court rejected Richardson's claim on the merits. *Id.* at 322-326. *Burks* v. *United States*, 437 U.S. 1 (1978), holds that the Double Jeopardy Clause bars a retrial where a defendant "obtain[s] an unreversed appellate ruling" that the evidence at the first trial was legally insufficient. *Richardson*, 468 U.S. at 323. But the Court noted that it had also "consistently adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Id.* at 324. The Court explained that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *id.* at 325, and it stated that "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which [a defendant] was subjected," *id.* at 326. As a result, the Court held that, "[r]egardless of the sufficiency of the evidence at [Richardson's] first trial, he ha[d] no valid double jeopardy claim to prevent his retrial." *Ibid.*

Petitioner seeks to distinguish *Richardson* on the ground that "*Richardson* addressed only whether a retrial following the erroneous denial of a motion to acquit would *violate double jeopardy*," and not the supposedly separate question of whether that erroneous denial may be reviewed on its own right after a conviction at a second trial. Pet. 23. But as the court of appeals correctly recognized (Pet. App. 11a-12a), the Court's answer to the first question logically controls the answer to the second.

"Petitioner seeks review of the sufficiency of the evidence at his first trial, not to reverse a judgment entered on that evidence, but as a necessary component of" his claim that the convictions obtained after a second trial should be set aside. *Richardson*, 468 U.S. at 322. Petitioner does not dispute the sufficiency of the evidence at his second trial; his contention is rather that the second trial never should have taken place. The only plausible basis for that claim is the Double Jeopardy Clause. The Double Jeopardy clause *would* bar a second trial if petitioner had been acquitted at the first. But unlike the defendant in *Burks*—and like the defendants in *Richardson* and *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294 (1984)—petitioner was not acquitted at his first trial: "he simply maintains that he ought to have been." *Id.* at 307. As this Court has explained, a "claim of evidentiary failure and a legal judgment to that effect * * * have different consequences under the Double Jeopardy Clause." *Id.* at 309; accord *Richardson*, 468 U.S. at 323.

Contrary to petitioner's suggestions (see, *e.g.*, Pet. 13, 23, 27), this Court's holding on "the merits" in *Richardson* (468 U.S. at 322) means more than that a retrial following a mistrial and an erroneous denial of a motion

to acquit does not violate double jeopardy. The holding logically entails that the erroneous denial of a motion to acquit can have no role to play in barring later proceedings. Because those proceedings *can* progress to a second trial, the validity of a conviction must be measured by the events at that trial—not at a first trial that produced no definitive outcome.[2]

Petitioner invokes the general principle that parties may "seek review of interlocutory rulings after final judgment," Pet. 20-21, and he asserts that *Richardson* does not "[d]isturb[]" that "[s]ettled [r]ule," Pet. 23 (emphasis omitted). But "interlocutory orders in a litigation are frequently rendered moot by the final judgment in the trial court," *Olson* v. *Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 733 (7th Cir. 1986) (Posner, J.), and a party cannot obtain reversal based on an interlocutory ruling whose impact has been mooted by subsequent events. See Pet. 22 n.6 (noting that "a party to a civil case that has gone to trial generally cannot appeal an earlier denial of summary judgment" and that "a criminal defendant cannot seek review of the mid-trial denial of his motion for acquittal made at the close of the government's case if he thereafter pres-

---

[2] This Court's recent decision in *Yeager* v. *United States*, 129 S. Ct. 2360 (2009), does not suggest otherwise. *Yeager* rejected the view that a retrial is always permitted when a jury hangs, holding instead that acquittals at the same trial can implicate the Double Jeopardy Clause's protections under the doctrine of collateral estoppel. *Id.* at 2368-2369. Petitioner relies on no such protection here. And *Yeager*'s discussion of *Richardson* casts no doubt on *Richardson*'s core holding that the Double Jeopardy Clause cannot bar a second proceeding absent an event, such as acquittal, that terminates jeopardy. See *Yeager*, 129 S. Ct. at 2369. Although petitioner disavows reliance on the Double Jeopardy Clause, he points to no other source of law that would bar his second trial.

ents evidence in his defense" (citing *United States* v. *Calderon*, 348 U.S. 160, 164 n.1 (1954)).[3] So too here. As the court of appeals correctly found (Pet. App. 5a-9a), the evidence at the second trial was sufficient to support petitioner's convictions. As a result, petitioner's claim that there was a failure of proof at his *first* trial, which did not result in a conviction, is now moot unless that alleged failure somehow barred the conduct, or invalidates the results, of the second trial. But that is a double jeopardy claim, and it is the one that *Richardson* rejected on "the merits." 468 U.S. at 322.[4]

---

[3] See *Sorensen* v. *City of New York*, 413 F.3d 292, 297 (2d Cir. 2005) (holding that some of the appellant's claims had been "mooted by the conduct of the second trial"); *Lambrix* v. *Singletary*, 72 F.3d 1500, 1508 (11th Cir. 1996) (holding, on federal habeas corpus, that a criminal defendant's claim that he was denied his right to testify at his first trial was mooted by the fact that the defendant had received a second trial), aff'd, 520 U.S. 518 (1997); *Blanche Rd. Corp.* v. *Bensalem Twp.*, 57 F.3d 253, 264 (3d Cir.) (holding that the "district court's decision to mold the verdict to conform with the jury's responses to special interrogatories" was "rendered moot" by the court's subsequent grant of a new trial), cert. denied, 516 U.S. 915 (1995); *United States* v. *Martinez*, No. 93-10423, 1994 WL 623007, at *4 (9th Cir. Nov. 9, 1994) (holding "that any arguable prejudice the government might have caused by not disclosing [a particular] report was cured when the court declared a mistrial"); *United States* v. *Valenzuela-Ruiz*, No. 93-50567, 1994 WL 561833, at *3 n.3 (9th Cir. Oct. 13, 1994) (finding that certain constitutional "[e]rrors that occurred before [the defendant's] first trial but which were cured before his second trial are moot"), cert. denied, 514 U.S. 1075 (1995).

[4] This Court has held that a colorable double-jeopardy claim is not mooted by the conduct of a second trial. See, *e.g.*, *Price* v. *Georgia*, 398 U.S. 323, 331 (1970). As *Richardson* makes clear, however, in light of the Court's decision, a double-jeopardy claim by a person in petitioner's position—*i.e.*, a person who was not acquitted but claims that he should have been—is not a colorable one. 468 U.S. at 326 n.6.

Petitioner is correct (Pet. 16-17) that, in certain filings in *Richardson*, the government suggested that a claim such as petitioner's could

3. Petitioner errs in contending (Pet. 13-16, 18-21) that the circuits are divided on this question. As petitioner acknowledges, three other courts of appeals "have reached the same result" that the Fifth Circuit reached in this case. Pet. 18; see Pet. 18-19 (citing *United States* v. *Julien*, 318 F.3d 316, 320-322 (1st Cir.), cert. denied, 539 U.S. 968 (2003); *United States* v. *Willis*, 102 F.3d 1078, 1080-1081 (10th Cir. 1996), cert. denied, 521 U.S. 1122 (1997); and *United States* v. *Coleman*, 862 F.2d 455, 460 (3d Cir. 1988), cert. denied, 490 U.S. 1070 (1989)). Those decisions all involved cases that were in the same procedural posture as this one—that is, an attempt to use the alleged insufficiency of the government's evidence at an initial trial, which ended in a mistrial, as a basis for upsetting convictions entered following a second trial.

In contrast, the decision upon which petitioner principally relies, *United States* v. *Recio*, 371 F.3d 1093 (9th Cir. 2004) (see Pet. 14-16), arose in a far different procedural posture. In *Recio*, the defendant was found guilty at his first trial. 371 F.3d at 1096. The district court denied the defendant's motion for a judgment of acquittal, but *sua sponte* granted a new trial because it concluded that it had misstated the law in its jury instructions. *Id.* at 1097. After a second trial, the jury found

---

be reviewed following the entry of a final judgment at the conclusion of the second trial. As petitioner also acknowledges (*ibid.*), however, those statements were made as part of the government's argument that such a claim was *not* immediately reviewable under the collateral order doctrine. The Court rejected the government's jurisdictional argument in *Richardson*, see 468 U.S. at 320-322, and, as noted in the text, the Court's rationale for rejecting the defendant's claim on "the merits" (*id.* at 322) requires rejection of petitioner's claim as well.

the defendant guilty and the district court denied his motion for a judgment of acquittal. *Id.* at 1098. The court of appeals reversed because it concluded that the government presented insufficient evidence at the second trial, but this Court reversed and remanded for further proceedings. *Id.* at 1097-1098. On remand, the court of appeals, without revisiting the sufficiency of the evidence at the second trial, see *id.* at 1106-1107, held that an erroneous jury instruction at that trial required a third trial. *Id.* at 1099-1103. "Having determined that" a third trial was necessary, the *Recio* panel turned to the defendant's argument that a third trial was barred "on double jeopardy grounds" because "the government presented insufficient evidence at * * * the first * * * trial[]." *Id.* at 1103. The panel reasoned that, because the defendant had no previous opportunity to obtain appellate review of the district court's denial of his motion for a judgment of acquittal at the conclusion of the first trial, he "should be allowed to appeal" that ruling "[n]ow that the district court's order has merged into a final judgment." *Ibid.* The panel ultimately concluded that the evidence at the first trial would have been sufficient to support a conviction, *id.* at 1104, and it remanded for further proceedings.

The Fifth Circuit's decision in this case does not conflict with *Recio*. First, as the court of appeals emphasized, the *Recio* panel's determination that it could review the sufficiency of the evidence at the first trial had no impact on the outcome of that case because the panel ultimately "found there was sufficient evidence and remanded for a new trial." Pet. App. 14a. As a result, *Recio* had no occasion to consider whether the district court's denial of the defendant's motion for a judgment of acquittal at the conclusion of the first trial had

been mooted by the court's subsequent order granting a new trial. Cf. *Recio*, 371 F.3d at 1104 n.9 (stating that "[b]ecause we ultimately determine that there was sufficient evidence presented at the first trial * * *, we need not decide whether [the defendant] could also use [his] first-trial insufficiency argument to challenge [his] second trial on double-jeopardy grounds").

Second, *Recio* is distinguishable from this case because the first trial in *Recio* ended in a guilty verdict rather than a mistrial. Although the *Recio* panel did not address mootness in the relevant section of its opinion, it may have been of the view that the sufficiency issue regarding the first trial was saved from mootness because, but for the district court's *sua sponte* new trial order, there would have been a judgment of conviction. See *United States* v. *Cross*, 258 Fed. Appx. 259, 261-262 (11th Cir. 2007) (per curiam) (reviewing a defendant's claim that the district court erred in granting a new trial rather than a judgment of acquittal in an appeal from the final judgment entered following a second trial). Here, in contrast, the jury deadlocked at petitioner's first trial, so the district court's decision to grant a new trial did not prevent the entry of a judgment of conviction that otherwise would have followed as a matter of course.

Third, the defendant in *Recio* did not attempt to use the alleged insufficiency of the evidence at an initial trial as a basis for upsetting an otherwise valid judgment of conviction that was entered after a second trial. Indeed, *Recio* distinguished *Richardson* on precisely that basis. See *Recio*, 371 F.3d at 1104 (emphasizing that the court was "not consider[ing] [the defendant's] first-trial insufficiency argument in order to decide whether the second trial violated the Double Jeopardy Clause," but rather

was addressing the "entirely different question [of] whether the defendant[] may be prosecuted at a *third* trial if the government presented insufficient evidence at the first"). Here, in contrast, petitioner identifies no basis other than the alleged insufficiency of the evidence at his first trial for upsetting the outcome of his second one.

Petitioner also relies on language in *United States* v. *Gulledge*, 739 F.2d 582 (11th Cir. 1984), that he himself characterizes as "dicta." Pet. 16. Like *Richardson*, *Gulledge* involved an interlocutory appeal by a defendant who sought to prevent a second trial on the grounds that the evidence at his first trial was insufficient. The Eleventh Circuit held that the defendant could not appeal the denial of his motion for acquittal following the declaration of a mistrial because there had been no "final decision[]" under 28 U.S.C. 1291, and it rejected the defendant's double jeopardy claim based on *Richardson*. See *Gulledge*, 739 F.3d at 584. Petitioner is correct that, in the course of dismissing the defendant's sufficiency claim based on lack of appellate jurisdiction, the *Gulledge* court stated that "the purported insufficiency of the evidence in the first trial is reviewable by this court only on appeal from a conviction after a second trial." *Ibid.* As petitioner acknowledges, however, "that statement was dicta given the posture of the case," Pet. 16, and the Eleventh Circuit does not appear to have issued a subsequent decision in *Gulledge*. In addition, the only authority that *Gulledge* cited in support of its dicta were two Fifth Circuit decisions —*United States* v. *Rey*, 641 F.2d 222, cert. denied, 454 U.S. 861 (1981), and *United States* v. *Wilkinson*, 601 F.2d 791 (1979). See *Gulledge*, 739 F.2d at 584. Both *Rey* and *Wilkinson* preceded *Richardson*, however, and

the Fifth Circuit has now disavowed both of them in light of *Richardson*. See Pet. App. 11a & n.12.

4. Petitioner argues (Pet. 25-28) that the issue he presents arises frequently. That claim is belied by the fact that half of the federal courts of appeals with jurisdiction over criminal cases do not appear to have had occasion to remark on the issue, even in dicta, during the 25 years since this Court's decision in *Richardson*. In addition, petitioner identifies only seven States whose appellate courts have considered the issue, see Pet. 25-26 nn.9-10, and he acknowledges that the reasoning of at least one of the decisions that he cites "does not survive *Richardson*," Pet. 25 n.9.

Petitioner also alludes to general considerations of fairness. Pet. 28. There is nothing unfair, however, about a retrial following a mistrial, because of society's compelling interest in having one full and fair opportunity to convict. *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984). And if the retrial does not offend the Double Jeopardy Clause, this Court should not rely on due process concepts of fundamental fairness, see *Dowling* v. *United States*, 453 U.S. 342, 352-353 (1990), let alone petitioner's vaguer appeal to generalized "fairness concerns" (Pet. 28) to invalidate a jury verdict after an error-free trial. Petitioner has thus failed to demonstrate that there is a pressing need for this Court's review, especially in the absence of a clear conflict among the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

JULY 2009